United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7133

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BARBARA NOBLE,

Plaintiff-Appellant,

-vs-

THE UNIVERSITY OF ROCHESTER and
STRONG MEMORIAL HOSPITAL,

Defendants-Appellees.

BRIEF OF PLAINTIFF-APPELLANT

Emmelyn Logan-Baldwin
Attorney for Plaintiff-Appellant
510 Powers Building
Rochester, New York 14614

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5 (e)

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggreived has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggreived within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Fair Labor Standards Act, Equal Pay Act, 29 U.S.C.§§206(d)(1),29 U.S.C. 215(a)(2), 29 U.S.C. 255(a)

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

215(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person-

* *

2. To violate any provisions of section 206 or section 207 of this title, or any of the provisions or regulation or order of the Administrator issued under section 214 of this title;

29 U.S.C. §255(a)

Any action commenced on or after May 14, 1947 to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act-

(a) if the cause of action accrues on or after May 14, 1947-may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

STATEMENT OF ISSUES PRESENTED

1. Did plaintiff properly perfect and file her claims of continuing, class-wide employment discrimination pursuant to Title VII of the Civil Rights Act of 1964?

2. Did plaintiff properly perfect and file her claims of continuing denial to her of equal pay for equal work pursuant to the Equal Pay Act?

STATEMENT OF THE CASE

This is an appeal from the Order and Decision of The Honorable Harold P. Burke, Judge, United States District Court for the Western District of New York dated March 1, 1976 and dismissing plaintiff's complaint of employment discrimination against the defendants brought pursuant to Title VII of the Civil Rights Act of 1964 and The Equal Pay Act. The Order and Decision which is unreported appears in the Joint Appendix at pages 74,75.

Plaintiff filed this lawsuit for injunctive relief, declaratory judgment and money damages to redress acts of discrimination in employment on the basis of sex on November 21, 1975. (A.2) The action was commenced within 90 days of plaintiff's receipt of a Right to Sue Notice from the Equal Employment Opportunity Commission on October 2, 1975. (A. 4) Filing of the lawsuit was preceded by plaintiff's complaining of the employment discrimination practiced by defendants to both State and Federal agencies. On March 3, 1975, plaintiff filed her claims with the New York State Division of Human Rights, the state deferral agency, thereby complying with 42 U.S.C. 2000e-5(c). On this same day, plaintiff forwarded for filing with the Equal Employment Opportunity Commission her charges of discrimination against the defendants. (A. 45)

Plaintiff's claims are still pending with the New York State Division of Human Rights, the Division having ruled that plaintiff makes claims of pervasive, class-wide, continuing employment discrimination against the defendants. (A. 45,58,59) The Equal Employment Opportunity Commission issued the Right to Sue Notice to plaintiff pursuant to 42 U.S.C. 2000e-5(f)(1). (A. 18)

At the time of filing of her complaint in federal court on November 21, 1975, plaintiff was employed by the defendants as a cardiac perfusionist in the operating room of Strong Memorial Hospital.[1] Plaintiff is a certified cardiac perfusionist and operates the life-sustaining equipment (membrane oxygenator, heart-lung machine) used in open heart surgery. Plaintiff has worked in open heart surgery at Strong Memorial Hospital since June of 1969, her employment with defendants beginning January, 1969. Plaintiff is a registered nurse with a diploma from the Toledo Hospital School of Nursing in 1966. She has further education at Ohio State University. Prior to being employed by the defendants, she was employed by Ohio State University and was in charge of the operating room at Ohio State University Hospital (A. 4,5)

[1] Plaintiff is presently on an educational leave of absence.

Plaintiff claims that from the inception of her employment with the defendants and continuing to date, defendants have discriminated against her and other women employees. In summary, plaintiff charges that the defendants have discriminated against her and other women solely because of sex by denying her and other women similarly situated equal compensation, equal terms, conditions and privileges of employment by the defendants engaging in a custom, practice and usage of discrimination in violation of law. She charges that the defendants have limited employment opportunities for herself and other women solely because of sex and have consistently and purposefully limited and deprived her and other women employees of rights guaranteed to them under law, with the intent and design, both directly and indirectly, of fostering and protecting the advantage and advancement of men employees to the detriment of women employees. In particular, plaintiff charges that the defendants maintain a policy, practice, custom or usage of discriminating against herself and other women employees by: (1) excluding women from certain job classifications (2) denying women equal pay for equal work (3) recruiting men for the best-paying, career-oriented jobs and relegating women to lower paying jobs with no career or advancement prospects (4) providing training to men employees and denying such training to women employees (5) promoting and advancing

men employees while denying these opportunities to women employees (6) fostering an atmosphere in the employment situation which is calculated to harass, embarrass, humiliate and cause the woman employee to "keep her place." (A. 5-7,42-44)

Notwithstanding that plaintiff Noble sought and continues to seek advancement at Strong Memorial Hospital, she has been denied and continues to be denied that advancement. (A. 4,44) Plaintiff has sought and continues to seek training opportunities; defendants have denied and continue to deny her those training opportunities. Since she has been employed, plaintiff Noble has sought and continues to seek equal pay for equal work; defendants have denied and continue to deny her equal pay for equal work. (A. 6-12,44)

In fact, notwithstanding that plaintiff Noble had been operating the heart-lung machine alone with only marginal assistance from persons she was training, took care of all of the cases, took care of all of the equipment, stayed late to assist with research that needed the use of the heart-lung machine, tested out a new membrane oxygenator, used that machine in the first cases in Rochester, New York and trained new employees to operate the equipment, defendants, in or about March to December, 1973 created a new position

of Chief Perfusionist to be filled by a man only. (A. 8,9) Defendants thereafter fostered the interest of a male in learning plaintiff's job, sent the selected man to school to learn the rudiments of the position and then employed him at Strong Memorial Hospital under the title of Chief Perfusionist, giving him a faculty appointment and a higher salary than plaintiff notwithstanding that he performs the same or similar work as the plaintiff and has less background, skill and education than the plaintiff. In fact, the male in question was not even qualified to take the examination to be certified as a cardiac perfusionist until July 1975. (A. 9, 10) When plaintiff's complaints of pervasive and continuing employment discrimination were ignored by the defendants, she duly took action to begin these proceedings.

Rather than answer plaintiff's complaint, defendants moved on or about December 12, 1975 to dismiss so much of plaintiff's claim as alleges jurisdiction under Title VII of the Civil Rights Act of 1964. Defendants contended that the general demand for injunctive relief in the complaint was improper since there is no specific provision for injunctive relief under the Equal Pay Act, for example, but conceded jurisdiction of the court of plaintiff's equal pay claims. (A. 29-33)

Plaintiff had caused to be served on the defendants along with the summons and complaint, First Notice to Produce. Documents were to be produced at the offices plaintiff's attorney on January 9 and 12, 1976. Defendants served Response to Notice to Produce on or about December 19, 1975 refusing to produce any documents at the offices of plaintiff's attorney and claiming that they should not ever be required to produce some documents. (A. 35-39)

Plaintiff cross-moved to compel discovery and opposed defendants' motion to dismiss the Title VII claims and effortto strike certain allegations of the Equal Pay claim. Plaintiff underscored that there is no question of timeliness of filing her claims with the Equal Employment Opportunity Commission since she was employed at the time of filing those claims and the employment discrimination practiced against her was continuing. The period of limitations for filing claims had not even begun to run since the discrimination against her had not been concluded. Plaintiff underscored that she is entitled to the relief pleaded under the Equal Pay Act. She noted that all of the documents required to be produced in the First Notice to Produce were relevant as a matter of law in an employment discrimination case and must be produced. (A. 41-53)

By decision dated March 1, 1976 The Honorable Harold P. Burke dismissed plaintiff's complaint. The court below

ignored the continuing employment discrimination practiced against the plaintiff in her being denied equal title, status and position with that of the man employee doing the same or similar work and less qualified than the plaintiff. The court below ignored the continual denial to plaintiff of equal pay for equal work and equal training opportunities, for example. The court ruled that "If plaintiff had received the job of 'Chief Perfusionist' in January 1974, she would have had no actionable complaint." The court applied the incorrect period of limitation under Title VII even when the claim is subject to such limitation by reason of not being continual discrimination. The court ruled that "...a charge be filed with the United States Equal Employment Opportunity Commission within 180 days after the alleged discriminatory practice occurred." The statute in fact provides that where there is a state deferral agency in a jurisidction where a charge is filed with the Equal Employment Opportunity Commission, the period of limitation is 300 days from the last act of discrimination. 42 U.S.C. 2000e-5(e). The court below ignored its jurisidction of the Equal Pay claims under the Equal Pay Act, dismissing those claims without any comment whatsoever in its decision.

Plaintiff appeals from all parts of the decision.

ARGUMENT

POINT I

PLAINTIFF HAS PROPERLY FILED HER CLAIMS PURSUANT TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE COURT HAS JURISDICTION OF THOSE CLAIMS UNDER THE ACT

Plaintiff's claims of employment discrimination against the defendants are claims of continuing discrimination. As the Equal Employment Opportunity Commission has noted in its procedure manual, Section 208, a copy of which is attached hereto as Appendix A, an attack on a current employment practice states a charge of continuing discrimination since a policy by nature is continuing. Such a charge is timely filed when received by the Commission.

Plaintiff has been employed by the defendants since 1969. She charges that from the beginning of her employment and continuing to the date of the filing of the complaint that she has been and is being denied equal terms, conditions and privileges of employment. She and other women employees of the defendants have been and are being excluded from certain jobs, she and other women have been and are being excluded from training opportunities, she and other women have been and are being denied equal pay for equal work, for example. All of these policies, practices, customs and usages of discrimination engaged in by the defendants were very much existent not only on March 3, 1975 when plaintiff first filed

her claims with the Equal Employment Opportunity Commission but all of these discriminatory practices of the defendants were ongoing at the time plaintiff filed her lawsuit in federal court, pursuant to Title VII, on November 21, 1975.

In light of the continuing nature of the discrimination, the court's dismissal of the complaint as untimely is erroneous. Since the discrimination complained of was continuing in all respects at the time of the filing with the Commission and even at the time of the filing of this lawsuit and even as of today's date, the period of limitations for the filing of employment discrimination claims under Title VII has not even commenced. When there is a claim filed with the Commission in a jurisdiction that has a state agency dealing with employment discrimination, the claim of employment discrimination must be filed with the Commission within 300 days of the last act of discrimination. 42 U.S.C. 2000e-5(e).

Courts have long recognized the continuing nature of employment discrimination acts and have held that time for the initiation of the running of the statutory requirement for filing a complaint runs from the cessation of the discriminatory activity. In other words, the statute of limitations does not begin to run until the challenged act or the employment relation ends. Dudley v. Textron, Inc., Burkart-Randall Division, 386 F. Supp. 602 (E.D. Pa. 1975).

Courts have found allegations of continuing discrimination sufficient in many different contexts, even when the allegation is merely that the discrimination continues. Pacific Maritime Association v. Quinn, 491 F. 2d 1294 (9th Cir. 1974). In Belt v. Johnson Motor Lines, Inc., 458 F.2d 443 (5th Cir. 1972) the court found continuing discrimination stated where the plaintiff had made two written applications for transfer and subsequent oral reapplications. In Rich v. Martin-Marietta Corp., 522 F.2d 333 (10th Cir. 1975), the court held that plaintiff's challenge to the promotion system was sufficient allegation of continuing violation. In Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971), cert den. 404 U.S. 939 (1971), the court found that a company's maintenance of a discriminatory retirement plan constituted a continuing act of discrimination. In Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969), the court found continuing discrimination properly pleaded when the complainant merely used the word "continuing" to characterize the discrimination. In Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973), the court construed the complaint as an attack on a discriminatory hiring system which continued to exist and which continued to operate to deny complainants jobs to which they claimed to be entitled.

Even if this complaint, for the sake of argument, were not construed as a complaint of continuing employment discrimination, plaintiff has met all of the jurisdictional prerequisites to filing a claim pursuant to Title VII of the Civil Rights Act of 1964. Plaintiff need only (1) file a complaint within 300 days of the alleged discrimination and (2) commence a federal lawsuit within 90 days of receipt of the Right to Sue Notice, 42 U.S.C. 2000e-5(e) and 42 U.S.C. 2000e-5(f)(1).

Defendants concede that plaintiff has filed this lawsuit within 90 days of receiving the Right to Sue Notice. Defendants dispute that plaintiff filed this lawsuit within 300 days of the discrimination.[1]

Defendants tried to focus on a "promotion" of the man in question to a position of "chief perfusionist" in January, 1974. That time, however, and the description of those acts are in dispute. Plaintiff alleges that the man in question was not qualified to take the examination to be a certified cardiac perfusionist until July 1975-some four months after she had already filed her claims of employment discrimination with the New York State Division of Human Rights and the Equal Employment Opportunity Commission. (A. 9) Plaintiff

[1] Defendants have actually argued that the claim need be filed within 180 days of the discrimination and the lower court so ruled. However, such an argument and ruling is clearly erroneous and contrary to the very explicit provisions of Title VII, 42 U.S.C. 2000e-5(e).

instructed the man in question in operating room procedures, the use of the open heart surgery equipment, the service and upkeep of the open heart surgery equipment even after the man in question had received his special training. The man in question worked under her. (A. 10)

Defendants have so far refused to participate in any discovery on this case. Documents which plaintiff has requested would establish, for example, the man's training under plaintiff, continuing to the time of the filing of these claims, the man's lack of certification, continuing to the time of the filing of these claims, for example.

Plaintiff filed these claims of employment discrimination within 300 days of any alleged accrual date. The man in-question even after returning from school, worked under plaintiff. He was not even eligible to be certified as a perfusionist until some four months after plaintiff had already filed her claims of employment discrimination. Plaintiff properly filed these claims pursuant to Title VII; the court should reverse the lower court, reinstating all of plaintiff's claims under Title VII.

POINT II

PLAINTIFF DULY COMMENCED HER LAWSUIT UNDER THE EQUAL PAY ACT; ALL CLAIMS UNDER THE EQUAL PAY ACT SHOULD BE REINSTATED

There are two separate and independent jurisdictional bases for plaintiff's claims of denial of equal pay for equal

work. The first basis is Title VII of the Civil Rights Act of 1964, as noted above. The second independent jurisdictional basis for the equal pay claims is the Equal Pay Act, 29 U.S.C. 206(d),215 and 216.

The court below dismissed the equal pay claims without any reference whatsoever to the jurisdictional basis for these claims under the Equal Pay Act. There is no legal argument that could be made that the plaintiff's claims were not properly filed under the Equal Pay Act. In fact, defendants didn't even ask for dismissal of the claims brought pursuant to the Equal Pay Act; defendants merely asked that the characterization of the discrimination in the complaint as effecting plaintiff and other women similarly situated be struck; defendants also argued that injunctive relief may not be granted under the Equal Pay Act.

Any employee who claims that she is being denied equal pay for equal work may file a claim under the Equal Pay Act. Such claim is to be filed within two years of the denial of equal pay if it is established that the denial is non-willful; a claim of denial of equal pay is to be filed within three years, if it is established that the denial of equal pay for equal work is willful. Brown v. Bouchard, 209 F. Supp. 130 (D. Mass. 1962); King v. J.C. Penney, Co., 58 F. R. D. 649 (N.D. Ga. 1973).

A separate cause of action for denial of equal pay for equal work accrues at each regular payday. "Sex based discriminatory wage payments constitute a continuing violation of the Equal Pay Act." Hodgson v. Behrens Drug Co., 475 F. 2d 1041, 1050 (5th Cir. 1973); cert. den., 414 U.S. 822 (1973). Plaintiff was employed by the defendants at the time she filed her equal pay claims with the Equal Employment Opportunity Commission; plaintiff was employed by the defendants when she filed this lawsuit; plaintiff is still employed by the defendants. The equal pay claim was obviously filed within two years of the accrual of the claim.

Moreoever, the three year statute of limitations would apply under the circumstances of this case rather than the two year statute of limitations since the denial of equal pay to the plaintiff is willful. Plaintiff alleges that notwithstanding her complaints to the defendants about denial to her, among other points, of equal pay for equal work, defendants continued and still continue the discrimination. (A. 4, 12) If an employer has knowledge of the equal pay act, then continued denial to an employee of equal pay for equal work constitutes willful violation of the act. Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir. 1972), cert. den. 409 U.S. 948 (1972); Brennan v. J.M. Fields, Inc., 488 F.2d 443 (5th Cir. 1974), cert. den., 419 U.S. 881 (1974); Brennan v. Heard, 491 F.2d 1 (5th Cir. 1974).

The court below was clearly in error in dismissing plaintiff's claims of denial of equal pay for equal work brought pursuant to the Equal Pay Act.[1]

CONCLUSION

For the foregoing reasons, plaintiff requests that the court reverse the decision of the lower court finding that plaintiff's complaint states claims against all defendants pursuant to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. The court should remand this case with directions that discovery as noticed by the plaintiff proceed immediately without further delay. All of the discovery requests of the plaintiff are proper in

---

[1] The argument to the court below by the defendants that plaintiff is not entitled to injunctive relief and that the references in the complaint to the discrimination effecting plaintiff and other women employees similarly situated, while not primarily before the court on this appeal, are nevertheless baseless. Under Title VII, 42 U.S.C. 2000e-5(g), the court has specific power to enjoin a defendant from engaging in any unlawful employment practice and may order such affirmative action as may be appropriate. The reference to the discrimination effecting not only plaintiff but other women employees similarly situated is not only the appropriate characterization of the discrimination involved in this lawsuit, but it is the language in which such discrimination has been described in numerous complaints of employment discrimination whether the complaint be described as an "individual" complaint or a "class" complaint. A complaint of employment discrimination is by definition a "class action" since an illegal employment practice effects more than one employee. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

an employment discrimination case as courts time and again have underscored. Green v. McDonnell Douglas Corp., 411 U.S. 792 (1973); Brown v. Gaston Co., Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), cert. den. 409 U.S. 982 (1972); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Jones v. Leeway Motor Freight Inc., 431 F.2d 245 (10th Cir. 1970), cert. den. 401 U.S. 954 (1971); United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); United States v. Jackson Terminal Co., 451 F.2d 418 (5th Cir. 1971), cert. den. 406 U.S. 906 (1972); Marquez v. Ford Motor Co., 440 F.2d 1157 (8th Cir. 1971); Graniteville Co. v. E.E.O.C., 438 F.2d 32 (4th Cir. 1971).

Plaintiff has detailed the basis for each discovery request, (A. 48-53) and there is no basis for any further delay in the expeditious prosecution of these claims by the plaintiff.

Emmelyn Logan-Baldwin
Attorney for Plaintiff-Appellant
510 Powers Building
Rochester, New York 14614

April 21, 1976

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Plaintiff-Appellant was served on the defendants-appellees by my causing two copies thereof to be mailed to attorneys for the defendants-appellees, Nixon, Hargrave, Devans & Doyle, John B. McCrory, Esq., of Counsel, Lincoln First Tower, Rochester, New York this 23rd day of April, 1976.

Emmelyn Logan-Baldwin
Attorney for Plaintiff-Appellant
510 Powers Building
Rochester, New York

April 23, 1976
Rochester, New York

APPENDIX A

SECTION 208--CONTINUING VIOLATION

Contents

[¶ 4101]

208.1 Introduction - Policy/Policy-Application Distinction

A Charging Party may attack a current employment policy, in addition to past applications of that policy; and, since a policy is by nature continuing, a "policy" charge always is timely filed (See IM 204-Timeliness). Thus the Commission's jurisdiction vests when it receives a charge which merely alleges the current existence of an unlawful policy. The Commission's jurisdiction does not await proof that the alleged policy exists in fact, or has been applied within 180 (or 300) days of the filing date. These are facts relevant to the merits of the charge, rather than to the Commission's jurisdiction to investigate it.

Charges which do not specifically include the work "policy", or otherwise suggest a continuing course of conduct, normally may be read, in context, to allege a continuing, i.e., policy-type, violation. The purpose of this Section is to alert the reader to the policy/policy-application distinction and the "continuing violation" approach to seemingly untimely charges.

[¶ 4102]

208.2 Traditional or Past Practices as Evidence of Existence of Current Policy

Whether an allegedly continuing practice, i.e., a present policy, exists is, as noted above, a question of fact. Charging Party has the burden of proceeding on whether an alleged policy in fact was extant during the 180 or 300-day period preceding the filing of the charge and/or thereafter. Barring admissions from Respondent, Charging Party must evidence sufficient specific acts (hiring acts, promotion

acts, etc.) from which an underlying policy (discriminatory hiring policy, promotion policy, etc.) reasonably may be inferred. Those specific acts need not have occurred during the 180 or 300-day period; it is enough that they occurred over a period of time directly preceding the 180 or 300-day period. The Commission and the courts will infer, absent other facts, that the thus inferred policy carried over into, and in fact existed during, the 180 or 300-day period. U.S. v. Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969), 2 EPD 10,083; CD 70-396, CCH 6101; CD 71-1101, CCH 6198. See also Cox v. U.S. Gypsum Co., 409 F.2d 289 (7th Cir. 1969), 2 EPD 9988 and Tooles v. Kellogg Company, 336 F.Supp. 142 (D. Neb. 1972) 4 EPD 7661. In Tooles, the court stated:

> "This Court adopts what it finds the better view that where the discrimination has been of a continuing nature, as herein alleged, evidence of prior acts against plaintiff must be allowed, to show the continuing pattern of discrimination which has occurred and continued to occur within the 210 day limit preceding the date the complaint was brought.

[¶4103]

208.3 Specific Situations Held to Constitute Continuing Allegations

(a) PROMOTION

Where an individual is denied a promotion, but the reasons for such denial would continue to frustrate his future efforts to attain a similar position (e.g., lack of high school education; lack of departmental seniority; failure to pass test, etc.) the failure to promote the individual may be deemed to constitute a continuing policy. See CD 71-1151, CCH 6208. Accord: Mack v. General Electric Co., 329 F.Supp. 72 (E.D. Pa. 1971), 3 EPD 8272 at n.6. - "In addition, we think a denial of upgrading operates to discriminate against an employee at least until he is upgraded as he deserves and we thus regard a discriminatory failure to upgrade as a continuing violation of Title VII." Likewise, in Jamison v. Olga Coal Co., ___ F.Supp. ___ (D.W. Va. 1971), 4 EPD 7787, the court ruled that an allegation of discriminatory promotions was continuing as to general policies and as to the failure of unions to redress the situation even though a specific act complained of by Charging Party occurred more than 90 days prior to filing of the charge and, indeed, before the effective date of Title VII:

> ... the charge before the EEOC involved two separate areas of discrimination, one general

and one specific. While it is true that the specific (charge of discrimination with respect to the promotion...) relates to conduct on the parts of defendants prior to the effective date of Title VII and to an incident occurring more than 90 days before the filing of the charge ... nevertheless the general charge of a denial of promotions to Negroes to better jobs and the failure on the part of the defendant unions to seek redress of such discrimination is not confined to the same time.

Accord, Tooles v. Kellogg, supra. But see, Jennings v. Illinois Central R.R. Co., ___ F.Supp. (W.D. Tenn 1970), 3 EPD 8012, aff'd per curiam, ___ F.2d ___ (5th Cir. 1971), 3 EPD 8275.

(b) TRANSFERS

The same theory applies to requests for transfers as to promotions. In Bell v. Johnson Motor Lines, 458 F.2d 443 (5th Cir. 1972), 4 EPD 7751, the lower court held that oral reapplications for transfer would not make a prior rejection timely by establishing a continuing violation. HELD: reversed.

"We cannot agree with the district court that a discriminatory labor practice may not be a continuing act. To so hold the facts of this case would permit discriminatory acts to go unrebuked, a construction far too restrictive and alien to the liberal construction we have previously given the Civil Rights Act ... there is no need to lock the courthouse door to his claim solely because he has alleged a contemporary course of conduct as an act of discrimination." But see, Younger v. Glamorgan Pipe and Foundry Co., 310 F.Supp. 195 (W.D. Va. 1969), 2 EPD 10,059.)

(c) LAYOFF AND RECALL

Cox v. U.S. Gypsum, supra:

While layoff may be a single act, the failure to recall constitutes a continuing violation. "In so concluding we consider the following facts:

(1) A layoff, as distinguished from discharge or quitting, suggests a possibility of re-employment. (2) A layman's claim of "continuing" discrimination, after a discriminatory layoff, readily suggests that he claims there has been subsequent recall or new hiring which discriminates against him. (3) The record, shows that the company had bound itself, by its collective bargaining agreement, to consider seniority in making a recall, and the agreement provides that an employee does not lose seniority by reason of layoff until one year has expired. (4) The Commission chose to accept these charges as timely. (5) The company received notices of other charges of similar current discrimination at or about the same time."

(d) PENSION PLANS

Leading case is Mixson v. Southern Bell Telephone and Tele. Co., 334 F.Supp 525 (N.D. Ga. 1971), 4 EPD 7606 and the companion Commission Decision, CD 71-1413, CCH 6225. The court concludes that Respondent's failure to pay widow death benefits is an allegation of a continuing violation. But see McCarty v. Boeing Company, 321 F.Supp 1100 (W.D. Wash. 1970), 3 EPD 8056.

(e) HIRING AND ADMISSION TO UNION

Watson v. Limbach Corp., ____ F.Supp. ____ (S.D. Ohio 1971), 4 EPD 7648. Charging Party applied for a job with Respondent Employer and membership in Respondent Union:

"It is the opinion of the court that since the complaint before us clearly alleges an ongoing pattern of discrimination against plaintiff and his class, it is not necessary that plaintiff be in strict compliance with §2000e-5d....[A] complaint...may not be dismissed on the grounds that it was untimely filed where the suit challenges the maintenance of an alleged discriminatory system rather than one isolated instance..."

Accord: EEOC v. Local 189, Plumbers and Pipefitters, 311 F.Supp. 464 (S.D. Ohio 1970), 2 EPD 10,181; Dobbins v. Local 212, IBEW, 292 F.Supp. 413 (S.D. Ohio 1968). For the proposition that a hiring policy may constitute a continuing violation, see also CD 72-1702, CCH 6361.

[¶ 4104]

208.4 Continuing Violations - Mootness

Individual relief for Charging Party, or mootness of a specific application of a continuing policy, does not bar adjudication of the lawfulness of the policy itself. In Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971), 3 EPD 8247, the exact position sought by plaintiff was abolished during the pendency of the court action. Respondent sought to have the case dismissed for mootness. In approving denial of this motion the court reasoned that:

> Similarly here, the burden which Southern Pacific's general labor policy and the state statutes in question place on Southern Pacific's employment of women remains and controls the company's future work assignments. Moreover, the fact that this cause arose under Title VII of the Civil Rights Act of 1964 provides additional support for the view that the action has not been mooted by the closing of the Thermal agency. That Title is so designed that, in the attainment of its objectives, the administrative agency primarily renders a conciliation service. The ultimate sanction is judicial enforcement initiated by individuals who are aggrieved. Section 706(e) of the Act, 42 U.S.C. §2000e-5(e). In many such cases, including this one, declaratory and injunctive relief is sought, the need for which is not necessarily dependent upon proof that a particular discrimination has continued.
>
> Thus, while the resulting litigation is private in form, it is intended to effectuate the policies of the legislation. So considered, such a suit constitutes more than the assertion of a private claim and, consequently, it is not necessarily defeated by the disappearance of the particular grievance which gave rise to the action. The controverted issue of unlawful employer discrimination remains; it may, and should be, judicially resolved and relief granted or denied. See Jenkins v. United Gas Corp., 400 F.2d 28, 30-33, (5th Cir. 1968), 1 EPD 9908.
>
> The discontinuance of the particular grievance which gave rise to this action may call for a denial of some of the relief requested. See Parham v. Southwestern Bell Tel. Co., 3 EPD 8021 433 F.2d 421, 429 (8th Cir. 1970). It does not moot the litigation.

[Section 209 begins on page 3651.]